

HIX N. WOMMACK, JR.

v.

OFFICE OF PERSONNEL MANAGEMENT

Docket No.

DA831L8110093

OPINION AND ORDER

Appellant applied for disability retirement from his position of Field Accountant with the U.S. Department of Agriculture, Rural Electrification Administration.¹ Appellant sustained a neck injury in an automobile accident in July of 1977, and has not worked in his position since February of 1978. Appellant's application was denied by the Office of Personnel Management (OPM), and he appealed OPM's decision to the Board's Dallas Regional Office.²

In the initial decision dated March 18, 1981, the presiding official found that while appellant has a medical condition that causes pain when he engages in extensive driving, appellant can manage the performance of the driving required for his position so that he is capable of performing useful and efficient service in his position. The presiding official concluded that appellant is not totally disabled, and affirmed OPM's denial of appellant's application.

Appellant has timely petitioned the Board for review of the initial decision, and OPM has responded in opposition.

Under 5 C.F.R. § 1201.115, this Board may grant a petition for review when it is established that: (1) new and material evidence is available that despite due diligence was not available when the record was closed; or (2) the decision of the presiding official is based on an erroneous interpretation of statute or regulation. Appellant bases his petition for review on both subsections of 5 C.F.R. § 1201.115.

First, appellant attempts to submit a statement from Dr. Ruth Jackson dated April 2, 1981, as new and material evidence. However, because appellant has not made a showing that despite due diligence this evidence was previously unavailable, he is precluded from presenting the evidence by way of a petition for review under 5 C.F.R. § 1201.115(a). See *Fritz v. Office of Personnel Management*, 5 MSPB 108 (1981); *Szczerbiak v. United States Postal Service*, 3 MSPB 82 (1980). And *Grant v. Department of the Navy*, 3 MSPB 42 (1980).

Next, appellant argues that the record evidence shows that his condition renders him totally disabled for useful and efficient service within

¹Appellant listed as reasons for his disability: "Neck injury—auto accident 7/22/77—inability to drive auto for short periods—loss of arm and hand use (partial)—stiff neck—suboxiation [sic] of neck maximum recovery reached November 1978."

²Appellant requested and was given a hearing, at which OPM chose not to be represented.

the meaning of 5 U.S.C. § 8331(6), and that the presiding official made several erroneous factual findings in regard to the length of the driving periods required in his position. These arguments have merit.

This Board has recently held in *Chavez v. Office of Personnel Management*, 6 MSPB 343 (1981), that it is the employee who bears the burden of persuasion by a preponderance of the evidence in an appeal before the Board from an OPM decision on a voluntarily initiated application for disability retirement. *Id.*, 353. Further, the Board held that the ultimate determination is to be based upon the probative value of *all* the evidence, taking into account: (1) objective clinical findings; (2) diagnosis and expert medical opinions; (3) subjective evidence of pain and disability; together with (4) all evidence relating to the effect of appellant's condition upon his or her ability to perform in the grade or class of position last occupied. *Id.*, 358.³

In the instant case, the presiding official discussed in detail the numerous medical documents contained in the record, along with the requirements of the appellant's position and his testimony in regard to his disability. The presiding official then determined that the issue to be decided in this case was whether appellant could perform the driving requirements of the Field Accountant position, since that was the specific requirement of the position which appellant contends he cannot fulfill.

After finding that (1) a report dated October 7, 1979, indicated that appellant could drive an hour without stopping; (2) that appellant's average trip appears to be 100 miles; and (3) that even if the driving were continuous, appellant would be required to stop only once during the trip, and that there is no reason why the appellant cannot make a stop, the presiding official concluded that appellant could perform the driving requirements of his position so that he is capable of performing useful and efficient service in his position.⁴

Appellant alleges both that the above factual findings of the presiding official are erroneous, and that the evidence of record sufficiently establishes that he is disabled in accordance with the law.

Specifically, appellant contends that the presiding official erroneously concluded from his testimony that he drives approximately 2,000 miles per month that it amounts to "an average of 100 miles per work day." Appellant argues in his petition that although some of his trips involve slightly less than 120 miles round trip, most of his jobs require in excess

³The Board also held in *Meighen v. OPM*, 7 MSPB 82 (1981) that the definition of "disability" in 5 U.S.C. § 8331(b) does not contemplate a condition of complete helplessness or inability to perform any of the functions of the particular position. Rather, as the statute clearly states, total disability is determined by the employee's ability or inability to perform in a useful and efficient manner.

⁴The presiding official also determined that appellant's difficulty (which was indicated in the medical reports) with entering and leaving an automobile due to his neck condition and height was obviated by the appellant driving a pickup truck rather than an automobile.

of five to six hundred miles round trip.⁵ Moreover, contrary to the view of the presiding official, the numerous medical reports in the record and the Superior Officer's Statement indicate that appellant's condition renders him unable to perform the extensive driving requirements of the Field Accountant position.⁶

Having reviewed the entire record evidence in this case as required in *Chavez v. OPM*, *supra*, and in consideration of the length of driving periods required in appellant's position, the Board finds that appellant has proven by a preponderance of the evidence, including objective clinical findings, diagnosis and expert medical opinions, subjective evidence of pain and disability and all other evidence relating to the effect of appellant's condition upon his ability to usefully and efficiently perform his position, that he is disabled to perform in his position as Field Accountant for the Department of Agriculture as the term disabled is used in 5 U.S.C. § 8331(6).⁷

Accordingly, the petition for review is GRANTED, and it is hereby ORDERED that:

- (1) The initial decision of March 18, 1981 is hereby REVERSED.
- (2) The Office of Personnel Management is directed to grant appellant's application for disability retirement.
- (3) Within ten (10) days of the date hereof, the Office of Personnel Management shall file with the Board's Dallas Regional Office written verification of its compliance with paragraph 2 of this order.

This is the final order of the Merit Systems Protection Board in this appeal. Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. § 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

⁵OPM has not refuted this contention in its response to appellant's petition for review.

⁶The medical reports, the Superior Officer's Statement, and requirements of the appellant's condition are summarized in the initial decision.

We note that we have considered Dr. Jackson's report and Standard Form 2801-B dated October 4, 1979, (upon which OPM apparently significantly relied in denying appellant's application) which stated that in her opinion appellant "... has shown some definite improvement as far as physical findings are concerned inasmuch as he has learned fairly well how to protect his neck in his everyday activities." Although the report does indicate the appellant had shown some improvement by that date, the report also stated that appellant was "disabled," that he would not be able to work as a traveling auditor, and that he would not be able to drive for long periods of time, "... certainly no longer than one hour without stopping." Moreover, in a more recent report dated November 26, 1980, Dr. Jackson reported that "Because of continued limitation of neck motion and of shoulder motion, it is my opinion that this patient cannot return to work which requires extensive driving."

⁷See *Cerrano v. Fleishman*, 339 F.2d 929, 931 (2d Cir.) *cert. denied*, 382 U.S. 855 (1965), in which the court held that it is sufficient that the employee is unable because of disability to perform useful and efficient service in the specific position which he occupies at the time the application is made for retirement.

For the Board:

ROBERT E. TAYLOR,
Secretary.

WASHINGTON, D.C., *September 23, 1981*